IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPEALLTE JURISDICTION.

CRIMINAL APPEAL NO. 363 OF 2003

Ganesh Anant Shirke ....Appellant.
V/s (Orig.Accd.)
The State of Maharashtra ....
Respondents.

Mr.A.T.Zhaveri, Adv. for the appellant.

Mr.P.S.Hingorani, APP for the State.

CORAM: V.G. PALSHIKAR
AND
SMT.NISHITA MHATRE, J.

15th December, 2006.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order of conviction and sentence passed by the learned Sessions Judge, Ratnagiri in Sessions Case No.34 of 2001 on 14.11.2002 the appellant-accused has preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. With the assistance of the learned Advocate for the appellant as also the learned Public Prosecutor we have scrutinized the entire evidence on record and reappreciated the same.

3. The prosecution story stated briefly is that the deceased Naina Nandkumar Shirke, 14 years old, was residing with her parents at

village Suseri No.1, Tahsil Khed, District Ratnagiri. On 26.1.2001 at about 6.00 p.m. there was quarrel between her and Manisha, the sister of the accused, at the public tap. Manisha disclosed the quarrel to her parents. After Naina returned to her house from the public tap, the accused and his family members came and abused her and her parents. After they went away, Naina was sitting in the inner room of her house. But after about 10 to 15 minutes the accused entered her inner room through the back door. He was having rock-oil can in his hand. He poured it on her. Then he lighted a match stick and set her on fire. Therefore, she raised shouts. The accused ran away after setting her afire. On hearing her shouts, her parents came running. They saw the accused running away. Her father poured water to save her. She got burn injuries on her head, chest, stomach, back, hands and legs. She was removed to Primary Health Center, Khed. Crime was registered on its basis and investigation started.

4. On completion of investigation the appellant was tried. The prosecution examined eight witnesses to prove the guilt of the accused and the learned trial Judge on appreciation of that evidence came to the conclusion of guilt and convicted the accused as aforesaid. It is this order which is questioned in this appeal.

5. PW1-Santosh Shire and PW2-Anil Shirke are panchas examined by the prosecution to prove various panchnamas like spot panchnama,

inquest panchnama etc. Their testimony is corroborated by the investigating officer-PW8-Shivaji Patil and therefore the documents exhibited by the police stand proved. It is therefore proved that the death of the victim was caused due to burns and it was caused at the spot where the prosecution says it was caused.

6. PW3-Nandkumar Shirke and PW4-Malti Shirke are father and mother of the victim who narrated the quarrel which existed. It was then they told the police patil PW7-Sadanand Shirke on the basis of whose report First Information Report was registered that the accused was the person who set the victim on fire. They have deposed that their daughter was 14 years old and quarrel arose because of dispute at the public tap. The victim and sister of the accused who also is of the age as that of victim had quarrel over water connection and it was reported by her to the accused. According to the prosecution the accused was enraged by this and therefore threw kerosene on the body of victim and put her on fire.

7. PW5-Govind Danej is the Special Executive Magistrate who recorded the dying declaration of the victim. PW6-Ramling More is the doctor who examined the victim and was present when the dying declaration was recorded. It is pertinent to note that there is no endorsement by the doctor at the beginning of the dying declaration regarding the state of health and mind of the victim. The certificate is

only at the end. The doctor is examined as PW6 but he does not say in the Court that the victim was in conscious condition to depose. All that he says in para 5 of his deposition is that:

> "5. The Tahsildar as well as police recorded her statement. I was present at that time. I gave certificate regarding her mental condition. That certificate is signed by me. Its contents are correct. It is marked as exh.29."

He does not depose that he saw the condition of the 'victim and the victim was physically and mentally in position to depose. Such positive statement is not forthcoming. Similar is the case of PW5-Govind Danej-Special Executive Magistrate who recorded the statement. He also has no where stated that the victim was in her condition to depose or make a declaration. He has no where said that the dying declaration which was recorded by him was certified by the endorsement of the doctor PW6 and in his cross examination he admits that he did not ask any question to the patient about her health. He admits that the medical officer, nurse and patient's mother were near the patient. He then says that the medical officer did not inform the parents of the victim that she was very serious. It goes to show that the parents were present by the side of the victim when the dying declaration was being recorded. It will thus be seen that the dying declaration does not confirm any norms as laid down in this regard. It is not recorded in

the manner it ought to have been. PW5 and others do not state in their deposition before the Court that the condition of the victim whilst giving statement was stable and fit. In the absence of any such evidence and endorsement, it is not possible in law to accept the dying declaration as the sole basis for convicting the accused and accept this evidence. There is no other evidence on record to show that the victim was put on fire by the accused.

8. There is yet another aspect which needs to be noticed. The alleged quarrel between Manisha sister of the accused and the victim was over connection of water at public tap. Such quarrels are so usual that they cannot result in such an extreme step being taken as is alleged to have been taken by the accused. Sometimes such quarrels may result in some assault or such similar aggression. But we are unable to accept that it can be a motive for murdering a person. As we have already observed there is no evidence on record to connect the accused to burning. In the peculiar circumstances of this case it was duty of the prosecution to prove a nexus between the burning and the accused. They have not examined his sister Manisha or any other witness to prove seriousness of the quarrel between the parties which took place at a public place. In the absence of any other corroborative evidence no reliance can be placed on such shaky dying declaration as is recorded by PW5. PW6 does not state before the

Court that the patient was in condition to depose. In such circumstances resting conviction solely on the dying declaration which is wholly unreliable is not permissible in law. In the result therefore the appeal succeeds and is allowed. The appellant-accused-Ganesh Anant Shirke is in jail. He be set at liberty forthwith unless otherwise required.